STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF THE PETITION FOR HEARING ON AIR QUALITY PERMIT NO. 8585 **No. EIB 21-48**

EARTH CARE NEW MEXICO, BY MIGUEL ACOSTA MUNOZ and LINDA MARIANIELLO, AS AN INDIVIDUAL

Petitioners,

v.

NEW MEXICO ENVIRONMENT DEPARTMENT

NEW MEXICO ENVIRONMENT DEPARTMENT'S REPLY TO PETITIONERS' RESPONSE TO MOTION *IN LIMINE* and WITHDRAWAL OF ITS REQUEST FOR A PRE-HEARING CONFERENCE

Pursuant to 20.1.2.113(E) NMAC, the New Mexico Environment Department ("Department" or "NMED"), files this Reply to the Petitioners' Response to the Department's Motion *in limine* and Request for Expedited Motion Schedule and Pre-Hearing Conference in the above captioned matter. The Department is requesting that the Hearing Officer grant the motion *in limine* barring the Petitioners and any of their witnesses, or any other party from presenting any evidence in any form on any issue that was not set forth in the Petition granted by the Environmental Improvement Board ("EIB") on October 15, 2021. The Department also withdraws its request for a pre-hearing conference.

Petitioners are attempting to amend their Petition without leave of the EIB and without seeking consent from the Department. Petitioners are also arguing that the Petition is an open-ended document that allows them to bring any claim they choose at any time prior to the hearing.

Both their attempt to untimely amend the Petition and their request that the Hearing Officer nullify the pleading requirements under 20.1.2 NMAC are contrary to law. For the reasons set forth below, the Department asks that the Hearing Officer grant the Motion *in limine* without a motion hearing.

I. THE COMMUNITY IS BRINGING NEW CLAIMS

a. Mr. Schneider's Testimony

Petitioners argue that the four new claims are supporting evidence for the original three grounds in the Petition. This is simply not true. Section 3 of the Community's Petition specifically states that "Petitioners appeal the Department's decision to issue Permit No. 8585 on the **following grounds**." [Petition at 3] (emphasis added). Petitioners then offered three grounds for appeal: (1) "The Department's decision approves a definition of ambient air that is contrary to law;" (2) "The air dispersion modeling is deficient, violating of the Bureau's Air Dispersion Modeling Guidelines, EPA Guidance, and applicable law;" and (3) The Department's hearing process violated Title VI of the 1964 Civil Rights Act and the Department's own policy." [Id at 3-4].

Because it is not relevant to the Petition, the Department is requesting that testimony on the following subject be excluded from the hearing:

> The permit should be remanded back to the New Mexico Environment Department for additional consideration of the cumulative impacts of air pollution from AAM and neighboring sources on nearby communities prior to being approved by the Department. The US Environmental Protection Agency has directed all EPA offices to clearly integrate environmental justice concerns into their plans and actions, meaning that the EPA is working to better consider the fair treatment and meaningful involvement of all people, regardless of race, color, culture, national origin and income and educational levels, when it comes to the development, implementation and enforcement of environmental laws, regulations and policies. As a state agency guided by EPA policy

[Comm. SOI at 10]. This testimony does not have any bearing on the grounds brought in the Petition. This is a new federal Civil Rights claim that was not included in the Petition, and the EIB

does not have jurisdiction over such claims. *See* 40 U.S.C. §§ 2000d-1, 2000d-2 (stating that enforcement of Title VI is under the jurisdiction of federal agencies and courts). In addition, the exhibits to Mr. Schneider's testimony include EPA documents issued *after* Permit 8585 was issued. So, not only are Petitioners bringing a new federal Civil Rights claim, but they are also asking the EIB to reverse the Department as an *ex post facto* action – in other words, Petitioners are asking that the Department be reversed because since the Permit was issued, some EPA policies recommendations have been issued that the EIB should consider.

Federal Civil Rights claims are outside of the jurisdiction of the EIB, and Petitioner's argument that this is evidence to support any of the grounds in the Petition is without merit. The federal Civil Rights claim brought in the Petition itself was based on the allegation that the hearing officer at the Permit hearing violated the Civil Rights of Spanish-speaking participants. Mr. Schneider's testimony does not even touch on that, but rather offers a completely new claim.

The Department is also requesting that the following subject be excluded from Mr. Schneider's testimony: "Mr. Schneider will offer the opinion that various permit conditions should be strengthened in order to best protect the health and welfare of the nearby communities." [Comm. SOI at 10]. Again, this is not related to the Petition. As review of Mr. Schneider's testimony itself shows that Mr. Schneider will testify regarding twenty-one different Permit conditions that have no bearing on this appeal. Essentially, Mr. Schneider intends to make a policy argument – not about this Permit or this hearing – but about air quality construction permits *in general*. In their response to the Motion *in limine*, Petitioners openly admit this: "Mr. Schneider's testimony is almost certainly relevant as it establishes facts of consequence, namely, whether the Department is issuing **permits** in violation of applicable law." [Comm. Resp. at 4] (emphasis added). So his testimony on this point is not about Permit 8585, but on every air quality construction permit that the Department

issues. This should not be permitted. This hearing is about Permit 8585 and the three grounds brought in the Petition. This is not a rulemaking hearing, nor does the EIB have the authority to reverse the Department based on other permits.

Lastly, the Department is requesting that the following subject be excluded from Mr. Schneider's testimony: "[i]f the decision to approve the permit is upheld by the EIB, many permit conditions should be strengthened to ensure that the permit is federally enforceable the operation will comply with applicable air quality standards." [Community EIB Exhibit 10 at 4]. Again, Mr. Schneider's testimony on this point is an attempt to open up the entire Permit, which is outside the scope of this hearing. Counsel for the Petitioners made the choice to bring a substantive appeal on the grounds that the modeling was deficient, and that the Department used a definition of *ambient air* that was contrary to law. The testimony of Mr. Schneider that the Department seeks to exclude has no bearing on these two very specific grounds. Also, it is important to note the Department is not seeking to bar all of Mr. Schneider's testimony. Some of his testimony is relevant to the Petition. Most of it is not, and those portions should be excluded from this hearing.

b. Mr. Acosta's Testimony

In their Statement of Intent, Petitioners state that

> Mr. Acosta will testify to the interests of Earth Care New Mexico and its membership in this Matter. Earth Care is an empowerment and community development organization serving neighborhoods in the Airport Road corridor. The Southside of Santa Fe has not seen adequate or equitable public investment in green spaces, culturally or linguistically relevant services, or community development resources, when compared to other parts of Santa Fe. Earth Care provides resources and events that engage Southside Santa Fe residents across generations to make a positive impact in the community and improve environmental and social conditions. Earth Care also coordinates the Santa Fe Mutual Aid project, hosting community events and, to date, redistributing $324,000 to community members in Santa Fe, particularly on the South side, for groceries, medicine, household supplies, and rent.

[Comm. SOI at 11]. Nothing in this statement presents anything that pertains to this Petition. It appears that Mr. Acosta intends to give a speech about his organization and about the inequitable distribution of public investment by the City of Santa Fe. Neither of these topics have any bearing on this hearing. Petitioners are essentially arguing that the EIB could reverse the Permit on the grounds that the City of Santa Fe does not invest in the City's southside. To the extent that Mr. Acosta is claiming that the policies of the City of Santa Fe are grounds for the EIB to reverse the permit, this is an additional federal Civil Rights claim. The EIB does not have the authority to reverse the Department on these grounds, and Mr. Acosta's testimony is not relevant to this appeal. Therefore, the Mr. Acosta's testimony should be excluded from the hearing. Mr. Acosta is free to give public comment on this topic, and the Hearing Officer can consider it in issuing his recommendation to the EIB.

II. PETITIONERS DO NOT RAISE "GENERAL AND SPECIFIC" CLAIMS IN THE PETITION

Petitioners are attempting to convince the Hearing Officer that their request for relief should be construed as a "general claim" that turns the Petition into an open-ended document that imposes no limits on the subject matter of the hearing. In Section 3 of the Petition, the Petitioners offer their request for relief:

> Petitioners request that the Board reverse the Department's decision to approve Permit No. 8585 because: a. The Department's decision violates the Clean Air Act, the New Mexico Air Quality Control Act, EPA guidance and Department guidelines. b. The Department's decision to issue Permit No. 8585 is arbitrary, capricious and contrary to applicable law.

[Id. at 4].

This request for relief is based on the three grounds in the Petition. *See* 20.1.2.202(A) NMAC (stating that an appeal petition with before the EIB must "identify the permitting action appealed from, **specify the portions of the permitting action to which petitioner objects** and

generally state the objections . . .") (emphasis added). The phrase "generally state the objections" simply means that a petitioner does not have to present their entire case in the petition itself. It does not void the requirement to state specific grounds. Petitioners now have the burden of persuasion to prove by a preponderance of the evidence that the grounds brought *in the Petition* merit a reversal. *See* 20.1.2.302 NMAC (stating that "the petitioner has the burden of going forward with the evidence and of proving by a preponderance of the evidence the facts relied upon to justify the **relief sought in the petition**.") (emphasis added). The relief that Petitioners sought in the Petition is reversal on the grounds in the Petition itself.

There is no such thing as a "general claim" under the law, and allowing such a claim would be a due process violation. Any claim has to be specific enough to be tried by fact. In order to support their attempt to have the Hearing Officer recognize a "general claim," Petitioners offer a number of cases that have no bearing on this matter. For example, to support their proposition that the Petition granted by the EIB was open-ended with regard to the number of claims that can be brought at the hearing, Petitioners cite *Montano v. Encinias*, 1985-NMSC-107, 103 N.M. 515. However, *Montano v. Encinias*, is a case about whether or not a court needs to issue orders to each party in a civil case. The holding of *Montano v. Encinias* is that "[w]hoever files the order or judgment shall forthwith provide all other parties with a copy showing the date of filing." *Id*. at ¶ 6. Petitioners do not explain how this applies to this matter.

Petitioners also offer *Madrid v. Vill. of Chama*, 2012-NMCA-071, which is a case regarding a Rule 12(B)(6) motion to dismiss. In *Madrid*, the court found that a 12(B)(6) dismissal was inappropriate because "the notice requirement [was] met if Madrid's *complaint* informs the Village of the incident giving rise to the claim and of the claim's general nature." *Id.* at ¶ 15

(emphasis added). In *Madrid*, the court is saying that the *complaint itself* must give sufficient grounds in a complaint in order to survive dismissal. The *complaint* in this EIB appeal is the Petition. Petitioners are attempting to convince the hearing officer that *Madrid* stands for the proposition that *after* a complaint is filed, that new claims can be brought that were not included in the complaint itself as long as the grounds in a complaint are non-specific and general. The law does not support this. More to the point in this matter, Petitioners are claiming that *Madrid* stands for the proposition that new claims can be brought at any time before a hearing without amending the Petition. This is not permitted under law.

Petitioners' arguments regarding a "general claim," and the case law offered in support, are based on New Mexico's Rules of Civil Procedure for District Courts ("Civil Rules"). However, the Civil Rules do not support Petitioners' argument. Under the Civil Rules, a "party may **amend** its pleading once as a matter of course at any time **before** a responsive pleading is served or . . . Otherwise a party may amend its pleading **only by leave of court or by *written consent of the adverse party*** . . ." Rule 1-015(A) NMRA (emphasis added). Petitioners did not seek leave to amend the Petition, and the Department has not consented to such an amendment. New Mexico courts have unambiguously held that Rule 1-015 NMRA "allows **one amendment** of a pleading to which there is a responsive pleading **as long as the responsive pleading has not been served**." *Moffat v. Branch*, 2002-NMCA-067, ¶ 26, 132 N.M. 412, 418 (emphasis added). In this appeal, the Petitioners submitted their Petition, and the Department submitted its answer. It is absurd to argue that New Mexico courts support the idea that two weeks before a hearing, new claims can be brought as long as they were not specified in the Petition. It is even more absurd to claim that a

request for relief can be construed as a non-existent "general claim." The Hearing Officer should decline to do so.

III. THE DEPARTMENT WILL BE PREJUDICED BY INCLUSION OF THE ADDITIONAL CLAIMS

Contrary to Petitioners' arguments, the Department will suffer prejudice – and that prejudice is already being felt. The Department is required to respond to Mr. Schneider's irrelevant dissertation on the permit policies and his recommendations for twenty-one permit revisions. All of which are outside the scope of the Petition. Currently, Department staff, who are already overworked, are working to address all of the issues raised by Mr. Schneider. This work will continue all the way to the hearing. Having to respond to four new claims, and twenty-one permit condition recommendations means that Department staff can no longer fully prepare for the Petition as granted by the EIB. This is actual prejudice. Petitioner's unlawful attempt are a wasteful of public resources, and the Department hereby withdraws its request for a hearing so that the Hearing Officer can issue an order on the Motion *in limine* as soon as possible.

IV. CONCLUSION

Petitioners came to the EIB asking for a hearing on three grounds and the EIB granted their request. Petitioners are now seeking to amend the Petition without asking leave and without seeking consent from the Department. This is contrary to law and the EIB rules, and should not be permitted. The Department respectfully requests that the Hearing Officer grant the Department's Motion *in limine* without a hearing so that the Department is able to properly prepare for the hearing in this matter.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Reply to Response to Motion in limine and for Expedited Motion Schedule, and Request for Motion Hearing and Pre-Hearing Conference* was served by email on the following on February 17, 2022:

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